82-264

CASE NO. _____

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

MARCUS IRVINE GRAVISS AND
JAMES BRIAN MCGEE ..... PETITIONERS

VS:

UNITED STATES OF AMERICA ..... RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER PETITIONERS' FOURTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AGAINST UNLAWFUL SEARCH AND SEIZURE WERE VIOLATED WHEN LAW ENFORCEMENT AUTHORITIES CONDUCTED A WARRANTLESS SEIZURE AND SEARCH OF PETITIONER-GRAVISS' AUTOMOBILE WHEN NO EXCEPTION TO THE WARRANT REQUIREMENT EXISTED?

II. WHETHER PETITIONERS' FOURTH AMENDMENT RIGHT UNDER THE UNITED STATES CONSTITUTION AGAINST UNLAWFUL SEARCH AND SEIZURE WAS VIOLATED WHEN UNDERCOVER AGENTS CONDUCTED A WARRANTLESS SEARCH OF CONTAINERS IN THE TRUNK OF PETITIONER-GRAVISS' AUTOMOBILE, WHICH WERE DOUBLE WRAPPED, WITH OPAQUE PLASTIC, AND SECURELY TIED?

TABLE OF CONTENTS

Page

Opinions 1-2

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 2-4

Statement of Material Facts 4-7

Reasons for Granting the Writ 7-23

I. WHETHER PETITIONERS' FOURTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AGAINST UNLAWFUL SEARCH AND SEIZURE WERE VIOLATED WHEN LAW ENFORCEMENT AUTHORITIES CONDUCTED A WARRANTLESS SEIZURE AND SEARCH OF PETITIONER-GRAVISS' AUTOMOBILE WHEN NO EXCEPTION TO THE WARRANT REQUIREMENT EXISTED? ... 7-19

II. WHETHER PETITIONERS' FOURTH AMENDMENT RIGHT UNDER THE UNITED STATES CONSTITUTION AGAINST UNLAWFUL SEARCH AND SEIZURE WAS VIOLATED WHEN UNDERCOVER AGENTS CONDUCTED A WARRANTLESS SEARCH OF CONTAINERS IN THE TRUNK OF PETITIONER-GRAVISS' AUTOMOBILE, WHICH WERE DOUBLE WRAPPED, WITH OPAQUE PLASTIC, AND SECURELY TIED? 19-23

Conclusion 24

TABLE OF AUTHORITIES

CASES: Page

Chimel v. *California*,
395 U.S. 752, 89 S.Ct. 2034,
23 L.Ed.2d 685 (1969) 15, 17

Coolidge v. *New Hampshire*,
403 U.S. 433, 91 S. Ct. 2022,
29 L.Ed.2d 564 (1971) 7, 13, 15, 17, 18, 19

Gouled v. *United States*,
255 U.S. 298, 65 L.Ed. 647,
41 S.Ct. 261 (1921) 21

Hoffa v. *United States*,
385 U.S. 293, 87 S.Ct. 408
17 L.Ed.2d 374 (1966) 21

Lewis v. *United States*,
385 U.S. 206, 87 S.Ct. 424,
17 L.Ed.2d 312 (1966) 20, 21

Osborn v. *United States*,
385 U.S. 323, 87 S.Ct. 429,
17 L.Ed.2d 394 (1966) 21

Schneckloth v. *Bustamonte*,
412 U.S. 218 (1973) 21

United States v. *McCormick*,
504 F.2d 281 (9th Cir. 1974) 14, 15, 17, 18, 19

United States v. *Silla*,
555 F.2d 703 (9th Cir. 1977) 9, 10, 11

United States v. *Sutton*,
341 F. Sup. 320 (W.D. Tenn.
1972) 9, 12, 13, 15, 18

TABLE OF AUTHORITIES

OTHER AUTHORITIES: Page

22 USC Section 1254(1) 2

49 USC Section 782 15

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MARCUS IRVINE GRAVISS AND
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VS:

UNITED STATES OF AMERICA ..... RESPONDENT

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Marcus Irvine Graviss and James Brian McGee, pray that a Writ Of Certiorari issue to review the Order of the United States Court of Appeals for the Sixth Circuit rendered on May 4, 1982.

OPINIONS

A Memorandum Opinion was issued by the United States District Court for the Eastern District of Kentucky on June 19, 1981 and was filed on June 22, 1981 overruling Petitioners' Motion to Suppress which was based on the same grounds raised in this Petition. The United States Court of Appeals for the Sixth Circuit affirmed the lower court by an Order

filed on May 4, 1982. A timely Petition For Rehearing was overruled on June 15, 1982. Copies of the above mentioned Opinion and Orders are contained in the appendix (hereinafter designated App.)

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was rendered on May 4, 1982. A timely Petition for Rehearing was overruled on June 15, 1982.

This Petition for a Writ of Certiorari was filed within sixty (60) days of that date. The jurisdiction of this Court is invoked pursuant to 28 United States Code Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this petition is the prohibition against unlawful search and seizure contained in the Fourth Amendment of the United States Constitution. (See Appendix p. 33a)

STATEMENT OF THE CASE

On April 1, 1981 a two count joint indictment was returned against Petitioners. Count one charged petitioners with conspiracy together with each other and with other persons to knowingly and intentionally distribute and dispense a controlled substance, marijuana, a schedule I controlled substance, which

conspiracy constituted a violation of Title 21, United States Code, Section 846. Count two charged petitioners with knowingly and intentionally possessing with intent to distribute and dispense a schedule I controlled substance, marijuana, in violation of Title 21, United States Code, Section 841(a) (1). Petitioners were arraigned on April 10, 1981, and trial was set for May 7, 1981, with appropriate deadlines for motions and instructions.

On April 27, 1981 various motions were filed on behalf of petitioners including a Motion to Suppress and Quash the Warrantless Search of petitioner-Graviss' automobile.

On May 7, 1981 a hearing was conducted by the trial court on the various motions including the above Motion to Quash the Warrantless Search and suppress any evidence seized thereby.

After briefs were filed by Petitioners and Respondent, the trial court on June 22, 1981 overruled petitioners' motions to quash the warrantless search of the automobile and to suppress the evidence seized as a result of the searches.

On July 20, 1981 Petitioners executed and filed a document waiving their right to a jury trial. The trial before the Court began on that date and was concluded on July 21, 1981. The petitioners renewed their motion to suppress all evidence seized as a result of the warrantless searches of petitioner-Graviss'

automobile. Numerous other motions were made during trial including a motion for judgment of acquittal. The trial court took the case under advisement and continued the matter until July 31, 1981.

On July 31, 1981 the trial court made Findings of Fact; Conclusions of Law and entered Judgment finding both petitioners guilty on both counts with which they had been charged.

On September 2, 1981 the trial court sentenced each petitioner to three years imprisonment on each count to be served concurrently and to be followed by a special parole term of two years for each.

On September 2, 1981 Petitioners filed their Notice of Appeal and were released on bond pending appeal to the United States Court of Appeals for the Sixth Circuit.

STATEMENT OF MATERIAL FACTS

An informant for the Oklahoma State Police, Larry Jones, phoned petitioner-McGee on February 22, 1981, in reference to the purchase of a considerable amount of marijuana first proposed by petitioner-McGee in a phone conversation to Jones on February 18 or 19, 1981. Numerous phone calls between Jones and petitioner-McGee followed in which price and amount of marijuana and arrangements for delivery were discussed.

Jones informed petitioner-McGee that he and others would come to Lexington, Kentucky, to consummate the deal. Agents Lowry, Atwood and Means from the Oklahoma Bureau of Narcotics accompanied Jones to Lexington arriving on the evening of March 6, 1981.

The next morning, March 7, 1981, Jones called petitioner-McGee and made arrangements to meet at the Hilton Inn in Lexington, Kentucky. Upon arrival at the Hilton Inn, petitioner-McGee phoned Room 142 and made arrangements to meet Jones in the coffee room of the Hilton Inn along with petitioner-Graviss and defendant-Gibson. During this meeting which Detective Malcom Atwood also attended, arrangements were made to consummate the transaction.

On the morning of March 8, 1981, petitioner-Graviss phoned Room 142 and then appeared at Room 142 to meet with Jones and detectives Atwood, Antle and Hadley. Petitioner-Graviss advised that he had three hundred (300) pounds of marijuana and all (excluding Jones and Atwood) agreed to travel in petitioner-Graviss' car out in the country to obtain the marijuana or to see if they wanted to buy it.

Petitioner-Graviss was driving a bronze Thunderbird and was accompanied by detectives Antle and Hadley when leaving. As they drove out of the lot, they met petitioner-McGee and defendant-Gibson.

Petitioner-Graviss advised them that he had the marijuana, and they were going to check it out.

Petitioner-McGee and defendant-Gibson were supposed to await their return.

After leaving the motel they traveled approximately one and one-half miles and pulled off of the highway. Petitioner-Graviss got out of the car and opened the trunk exposing three objects which were double-wrapped in opaque plastic. Detective Antle pulled out a knife and sliced one of the objects open and examined the contents by putting his hand in the bag, pulling some out and fondling and smelling of it. The objects were described as being in the form of bales.

Afterward they returned to Room 142 of the Hilton Inn where petitioners were placed under arrest some fifteen to twenty minutes later. At the time of the arrests the officers had the vehicle under surveillance and secured. The trunk of petitioner-Graviss' car was opened and the contents seized immediately after the arrests were made. However, the arrests were made in Room 142 and were not in the immediate vicinity of petitioner-Graviss' automobile.

The officers knew from February 18 or 22, 1981, that a drug deal was being worked. In addition the officers set the terms; taped at least nineteen (19) conversations; and took at least fifty photographs over a two day period of surveillance.

At the time of petitioners' arrests there were twelve officers on the scene who were in total control of all vehicles and suspects.

Although petitioner-Graviss' automobile was seized and searched without a warrant subsequent to his arrest, the officers obtained a search warrant for petitioner-McGee's vehicle.

REASONS FOR GRANTING THE WRIT

I. THE ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT HOLDING THAT THE WARRANTLESS SEIZURE AND SEARCH OF PETITIONER-GRAVISS' AUTOMOBILE WITHOUT THE EXISTENCE OF ANY EXCEPTION TO THE WARRANT REQUIREMENT DID NOT VIOLATE PETITIONERS' FOURTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AGAINST UNLAWFUL SEARCH AND SEIZURE IS IN CONFLICT WITH THIS COURT'S DECISION IN COOLIDGE V. NEW HAMPSHIRE, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

The facts upon which this issue has been decided in the courts below were not in dispute. It is only the legality of the warrantless seizure and search of petitioner-Graviss' automobile based on these undisputed facts which is contested. A brief review of the facts surrounding the seizure of petitioner-Graviss' automobile is set forth below.

After petitioner-Graviss and two of the undercover agents left the Hilton Inn, they traveled one and one-half miles before pulling off the highway. Peti-

tioner Graviss then opened the trunk of the vehicle and told the agents, "there it is, check it out." Detective Antle pulled out his knife and sliced one of the bales open and examined the contents. Petitioner Graviss and the detectives returned to Room 142 of the Hilton Inn where both petitioners were placed under arrest fifteen to twenty minutes later. At the time that the petitioners were taken into custody, they were in the motel room and were not in the immediate vicinity of the automobile. The automobile was under surveillance and was secured by several officers. The seizure of the automobile and the search of the trunk did not occur until over twenty minutes after the officers in their undercover capacity observed the marijuana in the trunk of the car.

Respondent attempted to justify the legality of the seizure and search of the automobile by offering the following explanation in its Brief before the Court of Appeals:

> "The officers knew the marijuana was still in the trunk after the arrest of the Defendants because the automobile had been kept under surveillance from the time it returned to the parking lot until after the arrests.
>
> Consequently the officers simply took custody of the evidence of the crime. There was no need to search, only to secure the evidence, and that is what Detective Scott did."

In ruling on the legality of the seizure of petitioner-Graviss' vehicle and the marijuana contained therein the trial court stated as follows:

> . . . "the subsequent securing of the marijuana at the Hilton Inn parking lot was a seizure of contraband already known to be present in the trunk of petitioner-Graviss' car and part of an ongoing criminal transaction." (App. p. 12a)

The trial court based this holding on *United States* v. *Silla*, 555 F.2d 703 (9th Cir. 1977) and on *United States* v. *Sutton*, 341 F.Sup. 320 (W.D. Tenn. 1972). In addition, the trial court set forth in a Memorandum Opinion the following factors which lead to the court's conclusion that the warrantless seizure was valid:

> "(1) This was a seizure following a valid search; (2) The object from which the marijuana was seized was an automobile; (3) The seizure was made promptly after the defendants were arrested; (4) the seizure was made at the scene of the arrest; (5) the detectives knew that the marijuana was in the trunk of the automobile, and marijuana is contraband; (6) the seizure concluded a continuing criminal transaction." (App. p. 16a).

Petitioners contend that both of the above cited cases can be easily distinguished and did not constitute authority sufficient to justify the warrantless seizure and search of petitioner-Graviss' car.

In *United States* v. *Silla*, *supra*, DEA agents followed a trailer to Ocotillo, California where it entered a truckstop parking lot. The truck was parked, the trailer unhitched and the driver drove away towards the border. Shortly thereafter, another driver came out of the coffee shop and hitched the trailer to his own truck. The agents then approached that driver and requested to speak with him. They also requested and received permission to search the trailer. Upon searching the trailer, approximately three thousand pounds of marijuana was found. After finding the marijuana, the driver was *immediately arrested*. The driver then *agreed to cooperate* with the agents by following through with his delivery of the trailer. After delivery the agents seized the trailer along with the marijuana contained therein. The trial court approved this seizure based upon the consensual search and the cooperation of the driver who had agreed to make delivery knowing that he was cooperating with DEA agents.

In this case the undercover agents observed the marijuana in petitioner-Graviss' car while acting in their undercover role. Petitioner-Graviss was not aware that either of the individuals was an undercover agent at the time the officers cut open the bale and observed the marijuana contained therein.

Petitioner-Graviss was not arrested at the time the undercover agents observed the marijuana nor was he asked to cooperate by returning to the Hilton

Inn to aid the officers in arresting any other individuals involved. At the time petitioner-Graviss returned to the Hilton Inn, entered the motel room and continued negotiations, no arrests had been made nor had petitioner-Graviss entered into any agreement with the undercover officers to aid them in completing their investigation. Assuming, *arguendo*, that the observance of marijuana by the officers in their undercover capacity was performed in a constitutional and permissible manner, the information they obtained did not relieve them of the requirement of obtaining a search warrant for the seizure of petitioner-Graviss' automobile. Unlike the officers in *United States* v. *Silla*, *supra*, the undercover agents in this case observed the marijuana in their undercover capacity and did not reveal their identity as police officers until petitioners were arrested at a later time and place. Therefore, petitioner-Graviss did not and could not have agreed with the undercover agents to cooperate with them in attempting to make other arrests. The situation in *Silla* is clearly distinguishable and is not applicable to this case.

To the undersigned's knowledge there is no case authority which states that observations made by undercover agents in their capacity as undercover agents do away with the protections guaranteed under the Fourth Amendment of the United States Constitution. Even assuming that the observations by the agents in their undercover role was legal, these

observations could only serve as probable cause for the issuance for a search warrant unless one of the other exceptions to the warrant requirement are met. Whether or not any of these other exceptions were met will be dealt with later in this argument.

In *United States* v. *Sutton, supra,* the undercover agents had agreed with the defendants to purchase marijuana, the defendant-Sutton had ordered that the marijuana be brought to them, shortly after that an automobile arrived and then defendant-Williamson told the undercover agents that marijuana was in the trunk of the car. The court held that this was more than adequate probable cause for the undercover agents to believe that marijuana was contained in the vehicle. The court then listed factors that caused the court to conclude that a warrant was unnecessary. The factors listed by the court are very similar to the factors listed by the trial court in this case. However, there is one very important additional factor. That factor was stated as follows:

> "(6) The arrests and search occurred at around 1:30 a.m. in the morning, when, common sense tells, judicial officers were not readily available in this community." *United States* v. *Sutton, supra* at 322.

This additional factor created exigent circumstances and justified the warrantless search because it satisfied the probable cause plus exigent

circumstances exception to the warrant requirement. A reading of the factors listed by the trial court in this case reveals that there was no finding of exigent circumstances which would justify the warrantless seizure and search. Therefore, *United States* v. *Sutton, supra* cannot be cited as authority to justify the warrantless seizure and search of petitioner-Graviss' automobile.

The Sixth Circuit Court of Appeals affirmed the trial court by holding that there was no search and that the seizure came only after officers had probable cause to believe the material was illegal contraband. (App. pp. 3a-5a)

In *Coolidge* v. *New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) this Court stated:

> "the most basic constitutional rule in this area is that 'searches (and seizures) conducted outside the judicial process, without prior approval by Judge or Magistrate, are *per se* unreasonable under the Fourth Amendment-subject to only a few specifically established and well-delineated exceptions.'" *Id.* at 403 U.S. 454-455, 91 S.Ct. 2032.

Petitioners contend that the validity of the seizure of the Graviss automobile must be examined by the standards set forth in *Coolidge*. In *Coolidge* the exceptions to the warrant requirement were discussed and resulted in this Court holding that the facts did

not justify the warrantless seizure and search of Coolidge's automobile. This Court specifically found that the following exceptions did not apply: search incident to arrest, probable cause with exigent circumstances and plain view doctrine. Each of these exceptions was considered by this Court and was rejected because the facts did not satisfy any of the above mentioned exceptions.

In *United States* v. *McCormick*, 502 F.2d 281 (9th Cir. 1974) the Ninth Circuit Court of Appeals cited *Coolidge* and applied the standard set forth therein to determine whether or not the warrantless seizure and search of the defendant's automobile was constitutionally permissible. In this case Secret Service agents came to McCormick's home and blocked his automobile in the driveway. Between fifteen minutes and one hour after McCormick's arrest, the Secret Service agents drove his car to the parking garage at the Federal Office Building in San Francisco. The next day another Secret Service agent searched the car and discovered an enlarged photographic negative of a treasury seal. There was no warrant issued for the seizure or the later search of the vehicle.

The court in *McCormick* found that the search incident to arrest exception did not apply because the defendant was found in the house, arrested and handcuffed. The Court determined that under no circumstances could the car be considered under his immediate control. Therefore this exception did not

apply based on *Chimel* v. *California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). The court also held that the automobile exception-probable cause with exigent circumstances-did not apply because there were no exigent circumstances existing at the time of the seizure and the later search of the vehicle as discussed in *Coolidge*. The court then discussed the plain-view exception and found that it did not apply using much of the same reasoning this Court used in *Coolidge*.

In *McCormick* the government attempted to justify the seizure and search by arguing that a warrant was not needed because the seizure was based on the forfeiture statute, 49 United States Code Section 782. The court held that the forfeiture statute in and of itself did not permit the warrantless seizure and search of a vehicle unless one of the other exceptions to the warrant requirement existed. The court then proceeded to examine the exceptions to the warrant requirement as set forth above. This statute is not applicable in this case.

In this case the respondent has never argued that an exception to the warrant requirement was met under the guidelines of *Coolidge*. Although the trial court cited *United States* v. *Sutton*, *supra*, as authority for overruling petitioners' Motion to Suppress, the trial court did not make a specific finding that exigent circumstances existed or that any of the other exceptions to the warrant requirement were fulfilled. The

United States Court of Appeals for the Sixth Circuit, likewise, only determined that probable cause existed for the seizure but did not mention any exigent circumstances nor did the Court of Appeals set forth any other exception to the warrant requirement that might apply.

In petitioners' Petition for Rehearing the Court of Appeals was requested to reconsider their holding that the seizure of petitioner-Graviss' automobile was valid because the agents had probable cause to believe there was illegal contraband in the automobile. The Petition for Rehearing was denied without further consideration on the issue now raised before this court.

To this day no court has made any determination that an exception to the warrant requirement was satisfied so as to justify the warrantless seizure and search of the Graviss automobile. The government has argued and the courts below have based the validity of the seizure on the ground that the information obtained by the agents in their undercover role was sufficient to create enough probable cause to do away with the warrant requirement and the full protection of the Fourth Amendment of the United States Constitution.

A review of the facts of this case will clearly reveal that none of the exceptions to the warrant requirement are available to respondent. The warrantless seizure of the Graviss automobile cannot be justified

by the search-incident-to-arrest exception. At the time of petitioners' arrests they were nowhere near the Graviss automobile which was under surveillance and secured immediately after the arrests. At no time has respondent claimed that this warrantless seizure was valid as being a search-incident-to-arrest nor has any of the lower courts so found. Based on the guidelines of *Chimel* v. *California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) under no circumstances could Graviss' car be considered in "immediate control" of the petitioners. *Coolidge* v. *New Hampshire, supra; United States* v. *McCormick, supra.*

The automobile exception, probable-cause-with exigent-circumstances, also is not applicable under the facts of this case. Again, at no time has respondent argued nor has any of the lower courts found that there were exigent circumstances sufficient to justify the warrantless seizure and search of the Graviss automobile. There can be no question that there was more than adequate probable cause to justify the issuance of a search warrant if you assume the undercover agents' observations of the marijuana in the Graviss automobile were constitutionally permissible. However, probable cause alone is not sufficient. This court in *Coolidge* v. *New Hampshire, supra,* made it clear that no amount of probable cause can justify a warrantless seizure unless exigent circumstances exist. Any question as to whether or not there were exigent circumstances in this case is easily put to rest

by the fact that the agents sought and obtained a search warrant for petitioner-McGee's car which was parked in the same Hilton Inn parking lot with the Graviss automobile. The agents had total control over petitioners and over the vehicles at all times after their arrests. Unlike *United States* v. *Sutton, supra*, a magistrate was obviously available to issue a search warrant since the agents did in fact obtain one in order to search petitioner-McGee's vehicle.

The last exception which is applicable to this case is whether or not the warrantless seizure of the vehicle can be justified under the plain-view doctrine. Again, neither respondent nor any of the lower courts have argued or held that the warrantless seizure of the Graviss automobile was justified under the plain-view doctrine. An examination of this Court's analysis in *Coolidge* v. *New Hampshire, supra*, and the analysis of the Ninth Circuit Court of Appeals in *United States* v. *McCormick, supra*, reveals that this exception to the warrant requirement is not available to respondent in this case. The facts in both *Coolidge* and *McCormick* are sufficiently similar to this case so as to easily refute any assertion that this automobile could be seized under the plain-view doctrine.

Petitioners respectfully request this Court to grant Certiorari on the grounds that the lower court decisions that the seizure and search of the Graviss automobile did not violate the Fourth Amendment of the United States Constitution are clearly in conflict

with this Court's decision in *Coolidge* v. *New Hampshire, supra.* It also appears that the decision of the Sixth Circuit Court of Appeals is in conflict with the decision of the Ninth Circuit Court of Appeals in *United States* v. *McCormick, supra,* to the extent that the Ninth Circuit followed this Court's reasoning and applied the guidelines of *Coolidge* v. *New Hampshire, supra,* whereas the lower courts in this case have failed to use the same guidelines.

II. PETITIONERS' FOURTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AGAINST UNLAWFUL SEARCH AND SEIZURE WERE VIOLATED WHEN UNDERCOVER AGENTS CONDUCTED A WARRANTLESS SEARCH OF CONTAINERS IN THE TRUNK OF THE GRAVISS AUTOMOBILE WHICH WERE DOUBLE-WRAPPED, IN OPAQUE PLASTIC, AND SECURELY TIED?

There were numerous discussions between petitioners and the undercover agents regarding how, when and where the marijuana was to be delivered. The agents took a very active role in dictating the terms upon which they would accept delivery.

On March 8, 1981 petitioner-Graviss arrived at the Hilton Inn and then was accompanied by Detectives Antle and Hadley in the Graviss automobile out into the country to determine whether or not the agents wished to purchase the marijuana. After driving approximately one and one-half miles petitioner-Graviss pulled to the side of the road and opened the trunk of his vehicle. He then made the comment

"there it is, check it out." Detective Antle then pulled out a knife and sliced one of the bales open and examined the contents by putting his hand in the bag and pulling some out. The agents then agreed to the purchase and returned to the Hilton Inn with petitioner-Graviss. Subsequent to returning to the Hilton Inn and after further discussion, both petitioners were placed under arrest in Room 142 and taken into custody.

The trial court held that the search and observation of the marijuana by Detectives Antle and Hadley did not violate petitioners' rights under the Fourth Amendment of the United States Constitution. As grounds for this holding the trial court stated that the search was consensual. The court cited *Lewis* v. *United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966) as authority for holding that this was a valid consensual search.

The Sixth Circuit Court of Appeals agreed with the trial court that petitioner-Graviss consented to the search of his vehicle at the time when the agents cut the bales open and observed the marijuana contained therein.

Petitioners contend that searches conducted in this manner are a violation of petitioners' rights against unlawful search and seizure as guaranteed by the Fourth Amendment of the United States Constitution. Petitioner contends that this Court's

holding in *Gouled* v. *United States*, 255 U.S. 298, 65 L.Ed. 647, 41 S.Ct. 261 (1921) should be extended to include searches conducted by undercover agents.

If petitioner-Graviss gave his consent to the search, as the lower courts held, this consent was most assuredly based upon fraud and deceit. It cannot be contended that petitioner-Graviss knowingly waived his rights under the Fourth Amendment of the United States Constitution under the test set forth in *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

Petitioner is aware of the leeway which this court has given undercover agents in the past. Petitioner is also aware that this Court's opinion in *Lewis* v. *United States, supra*, which was cited by the trial court, would indicate that the search by the agents in this case did not violate their constitutional rights.

However, petitioners respectfully request this court to reconsider the position which has been taken by this Court in *Lewis* v. *United States, supra; Osborn* v. *United States*, 385 U.S. 323, 87 S.Ct. 429, 17 L.Ed.2d 394 (1966); and *Hoffa* v. *United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966) regarding the scope of permissible intrusion by undercover agents or their informants.

Petitioners urge this court to reconsider the extent to which government agents and agencies will be permitted to intrude in our private lives and urge this court to adopt the attitude expressed by Mr.

Justice Douglas in his dissenting opinion to the above cited cases.

The role of the undercover agent has been seriously questioned of late. Criticism of the abuses by undercover agents and the tactics which they have used has rapidly grown. The overzealous undercover agent threatens our liberty and our constitutional rights against unlawful search and seizure.

If our rights continue to be eroded, then it will soon be "anything goes" for agents in their attempt to prevent crime.

Surely a better line can be drawn between those acts which are permissible by undercover agents and those which are constitutionally repugnant. It is ironic that an undercover agent may enter constitutionally protected areas and engage in activities which encourage the commission of a crime while dressing and acting the part of a criminal, without court approval, but he cannot enter the same areas while dressed as a police officer without court approval. It appears that a police officer can accomplish more through fraud and deceit than is constitutionally permissible when he is clearly identified as a police officer. This most certainly erodes the safeguards which our constitution proposes to place between us and the undercover governmental agent.

Individuals are permitted to waive various constitutional rights on a daily basis across this country

in numerous state and federal courts. However, the waiver of these rights has been attacked and challenged in a multitude of cases resulting in this court setting forth standards for what can be deemed knowing and valid waivers. This court has never held that a constitutional right can be waived in a judicial proceeding where fraud and deceit can be used to influence that individual to waive one of his constitutional rights.

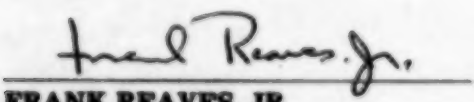
However, undercover agents are being permitted to use any type of fraud and deceit to gain "consent" to conduct searches and seizures so long as that is an aid to their attempt to solve a crime. Although it is everyone's desire that there be no crime, the constitutional rights of criminals must be maintained in order that the constitutional rights of others shall persevere.

Petitioners respectfully request the court to review the role of the undercover agent and reconsider the scope of his permissible undercover activities which affect constitutional rights.

CONCLUSION

For the foregoing reason, petitioners respectfully request this court to grant this Petition For Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



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APPENDIX

CASE NO. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1982

MARCUS IRVINE GRAVISS AND
JAMES BRIAN MCGEE ..... PETITIONERS

VS:

UNITED STATES OF AMERICA ..... RESPONDENT

APPENDIX

FILED
JUN 15 1982
JOHN P. HEHMAN, Clerk

81-5683

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. ORDER

MARCUS IRVINE GRAVISS,
JAMES BRIAN McGEE,
Defendants-Appellants.

Before: ENGEL and CONTIE, Circuit Judges; and CECIL, Senior Circuit Judge.

Appellant having filed a petition for rehearing with this court, and this court having considered said petition and finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE
COURT

/s/ John P. Hehman
Clerk

* * * * * * *

FILED
MAY 4 1982
JOHN P. HEHMAN, Clerk

No. 81-5683

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. ORDER

MARCUS IRVINE GRAVISS,
JAMES BRIAN McGEE,
Defendants-Appellants.

Before: ENGEL and CONTIE, Circuit Judges; and CECIL, Senior Circuit Judge.

Defendants were found guilty after a trial before the court sitting without a jury of both counts of an indictment charging them with conspiracy to distribute marijuana in violation of 21 U.S.C. §846 and possession with intent to distribute marijuana in violation of 21 U.S.C. §841(a)(1). In their direct appeal, they assert as sole basis for reversal of their conviction that the trial court erred in overruling a motion to suppress evidence seized, they claimed, as a result of an unlawful and warrantless search of defendant Graviss' automobile. While defense counsel has filed an excellent brief carefully outlining the law of search of seizure, particularly as it relates to the warrantless

search of the automobile, it clearly appears from the record and was so found by the trial judge that the search of the vehicle which took place was not only with the consent of Graviss, but upon his express invitation. The proof showed that an undercover government agent whom the defendants had thought was going to purchase the marijuana was asked to inspect the drug for quality after the defendant, Graviss, had voluntarily opened the trunk of his car and pointed it out to the agent. Under these circumstances, the trial court properly held that there was no search and that the seizure came only after the agent had probable cause to believe that the material was illegal contraband and took possession of it for that reason. Appellant's assertion that in some way the undercover agents were obligated to disclose their identity prior to the time of actual arrest, while novel, finds no support in current federal criminal law. Accordingly,

IT IS ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

ISSUED AS MANDATE: JUNE 24, 1982
COSTS: NONE

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By /s/ Audrey Crockett
Deputy Clerk

* * * * * * * *

FILED
JUN 22 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LEXINGTON

CRIMINAL NO. 81-12

UNITED STATES OF AMERICA PLAINTIFF

VS. MEMORANDUM OPINION

MARCUS IRVINE GRAVISS
JAMES BRIAN MCGEE DEFENDANTS

* *

Defendants Marcus Irvine Graviss and James Brian McGee have submitted several pre-trial motions. An evidentiary hearing was held at which disposition of the pending motions were made except for the following: (1) a motion to rule tape recordings inadmissable; and (2) a motion to suppress any and all evidence secured as a result of the warrantless search of defendant Graviss' automobile.

The motion to rule the tape recordings inadmissable is founded on *United States* v. *Starks*, 515 F.2d 112 (3d Cir. 1975). There, the court adopted the rule laid down in *United States* v. *McKeever*, 169 F.Supp. 426 (S.D.N.Y. 1958) that, before a sound recording is admitted into evidence, a foundation must be established by showing the following:

(1) That the recording device was capable of taking the conversion to be offered in evidence;

(2) That the operator of the device was competent to operate the device;

(3) That the recording is authentic and correct;

(4) That changes, additions or deletions have not been made in the recording;

(5) That the recording has been preserved in a manner that is shown to the court;

(6) That the speakers are identified;

(7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

Subsequently to the evidentiary hearing, plaintiff and defendants stipulated and agreed that the government has met its burden on the first six elements of the *Starks* test. Defendants maintain, however, that the conversations elicited were not made voluntarily and in good faith and that they were the result of improper inducement. More specifically, they allege that agents of the Oklahoma State Bureau of Narcotics promised one Larry Jones, who then had two criminal actions pending against him in Oklahoma, that they would seek leniency for him regarding those two charges if he cooperated in the making of the tapes.

Larry Jones testified at the evidentiary hearing as to the voluntariness of the monitored conversations. Jones stated that no assurances were given that the

pending criminal charges would be dismissed if he cooperated in making the tape recordings. He was informed that the agents would seek leniency for him from the county prosecutors if he cooperated. He acknowledged that his cooperation would not guarantee leniency and consistently maintained that his actions were voluntary and something that he wanted to do. Jones also testified that his own attorney was a participant in some of the conversations with the agents and the county prosecutors.

In *United States* v. *Silva*, 449 F.2d 145, 146 (1st Cir. 1971), *cert. denied*, 405 U.S. 918 (1972), the court stated:

> . . . [T]o establish involuntariness the defendant's burden is to show that [the informant's] will was overcome by threats or improper inducement amounting to coercion or duress. . . . [W]e do not view a promise of leniency with respect to a pending indictment as coercive, at least in the absence of evidence that the indictment had been improperly brought.

The Sixth Circuit quoted the above language and adopted it in *United States* v. *Hodges*, 539 F.2d 898 (6th Cir. 1976), *cert. denied*, 429 U.S. 1091 (1977), holding tape recordings admissible where the informant testified that contact with the drug enforcement agency was upon his voluntary invitation and that, although he hoped for leniency, no promise of leniency was offered by government officials. Earlier, in *United*

States v. *Franks*, 511 F.2d 25 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975), the Sixth Circuit held that an informant's consent was sufficient and tape recorded conversations therefore were admissible even though the government dropped criminal charges against the informant and gave him other special considerations.

When the government seeks out the informant and initiates the bargaining, a heightened degree of caution may be required of trial judges, but it is not a *per se* foreclosure of a finding of voluntariness. *United States* v. *Avacino*, 467 F.Supp. 284 (E.D. Pa. 1979). Noting that seven Courts of Appeals have ruled that a person's consent to recording his conversations is not rendered involuntary because his cooperation has been obtained in return for a promise of lenient treatment,[1] the court declared:

> But the fact that the [government's] assurances were the quid for the quo of [the informant's] cooperation does not, without more, make the transaction between the Government and [the in-

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[1] *United States* v. *Gladney*, 563 F.2d 491 (1st Cir. 1977); *United States* v. *Silva*, *supra*; *United States* v. *Bonanno*, 487 F.2d 654 (2d Cir. 1973); *United States* v. *Moskow*, 588 F.2d 882 (3d Cir. 1978); *United States* v. *Dowdy*, 479 F.2d 213 (4th Cir.), *cert. denied*, 414 U.S. 823 (1973); *United States* v. *Franks*, *supra*; *United States* v. *Hodge*, *supra*; *Good* v. *United States*, 378 F.2d 934 (9th Cir. 1967); *United States* v. *Ryan*, 548 F.2d 782 (9th Cir.), *cert. denied*, 429 U.S. 939 (1976); *United States* v. *Baker*, 139 U.S.App.D.C. 126, 430 F.2d 499, *cert. denied*, 400 U.S. 965 (1970); *United States* v. *Jones*, 140 U.S.App.D.C. 70, 433 F.2d 1176 (1970), *cert. denied*, 402 U.S. 950 (1971).

formant] an instance of over-reaching prohibited by *Starks*. Judicial inquiry is confined to the question 'whether the consent was voluntary, and uncoerced, not whether the motivations for it were altruistic or self-seeking.' *United States* v. *Osser*, 483 F.2d 727, 730 (3d Cir. 1973). The threat or promise which may void a confession does not automatically stamp the monitoring of a conversation as unconsented to. For, in the prevailing view, '[r]equiring [an informant] to face up to the real world in order to obtain his cooperation . . . is permissible under our system.' *United States* v. *Ryan*, 548 F.2d 782, 790 (9th Cir. 1976).

Id. at 287.

The Court finds from the testimony of Larry Jones that Jones, the informant herein, acted freely and voluntarily without coercion or improper inducement when he consented to the monitoring and taping of his conversations with defendants. Based upon the above-cited case law, the hope and/or promise of lenity on criminal charges pending against him did not serve to invalidate the consent. The seventh element of the *Starks* test is therefore met and defendants' motion to rule the tape recordings inadmissable must be denied.

Defendants' second motion is a motion to suppress any and all evidence seized as a result of the warrantless search of defendant Graviss' automobile. Briefly stated, Larry Jones, working as a government informant, initiated a series of telephone conversa-

tions with defendants to arrange a purchase of marijuana that would involve undercover drug enforcement agents. On Sunday, March 8, 1981, in Lexington, Kentucky, the deal was to be consummated. Defendant Graviss advised an agent of the Oklahoma State Bureau of Narcotics and two detectives of the Kentucky State Police that he had in his car outside the Hilton Inn in Lexington, Kentucky, approximately three hundred (300) pounds of marijuana that he had previously agreed to sell them. The two detectives and defendant Graviss drove to a secluded spot on Iron Works Pike in Fayette County, Kentucky, where defendant Graviss opened the trunk and showed the detectives three large bundles of marijuana, double-wrapped in plastic and bound. One detective removed a pocket-knife, slit the plastic wrap, reached in and pulled out some of the marijuana, feeling it and smelling it. The detectives and defendant Graviss returned to the Hilton Inn parking lot and met defendant Richard H. Gibson (now deceased) and defendant James Brian McGee, who were in a maroon Oldsmobile. The detectives and defendants then proceeded to Room 142 of the Hilton Inn where the defendants were arrested.

Following the arrest, the detectives obtained the keys to defendant Graviss' car from Graviss, opened the trunk and seized the marijuana. The maroon Oldsmobile was driven to the Kentucky State Police Headquarters in Frankfort, Kentucky, where it and

its contents were maintained in a locked condition until a search warrant was secured. Defendants argue that the marijuana seized from the trunk of Graviss' car should be suppressed because it is the result of a warrantless search and unconstitutional under the rationale of *Carroll* v. *Unites States*, 267 U.S. 132 (1925) and its progeny, in particular *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

The Court finds that the facts lead to but one conclusion, that is, that the detective's examination of the marijuana on Iron Works Pike was a search sanctioned by *Lewis* v. *United States*, 385 U.S. 206 (1966); the subsequent securing of the marijuana at the Hilton Inn parking lot was a seizure of contraband already known to be present in the trunk of defendant Graviss' car and part of an ongoing criminal transaction.

In *Lewis* v. *United States, supra*, an undercover federal narcotics agent, by misrepresenting his identity, was twice invited to the home of Lewis for the purpose of executing unlawful narcotics transactions. Lewis was subsequently arrested, charged with and convicted of violations of the narcotics laws relating to the marijuana sales. A pretrial motion to suppress as evidence the marijuana and the conversations between Lewis and the agent was denied. Lewis appealed, arguing that in the absence of a warrant, any official intrusion constituted a Fourth Amendment violation and the fact that Lewis had invited the

intrusion could not be held a waiver when the invitation was induced by fraud and deception. The Supreme Court disagreed. It declared:

> In the instant case . . ., [Lewis] invited the undercover agent to his home for the specific purpose of executing a felonious sale of narcotics. [Lewis'] only concern was whether the agent was a willing purchaser who could pay the agreed price. . . . During neither of his visits to [Lewis'] house did the agent see, hear, or take anything that was not contemplated, and in fact intended, by [Lewis] as a necessary part of his illegal business. Were we to hold the deceptions of the agent in this case constitutionally prohibited, we would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional *per se.*

Id. at 210. The sequence of events here demand no greater protection. Succinctly put, this was a valid consensual search. *See generally,* 2 W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* Section 8.2 (1978).

The issue becomes, then, whether the seizure of the marijuana at the Hilton Inn parking lot was valid. A similar fact situation appeared in *United States* v. *Silla,* 555 F.2d 703 (9th Cir. 1977). There, federal agents spotted a truck-trailer bearing a California license that had entered the United States from Mexico at Calexico. The truck-trailer was known to be used by drug smugglers. The agents followed it to

Ocotillo, California, where it entered a truck stop. The trailer was unhitched from the truck and subsequently hitched to a second truck by a different individual. The agents received the permission of the driver to search the trailer. They found approximately 3,000 pounds of marijuana. The driver was arrested and agreed to cooperate with the agents by following through with the delivery. After other stops and the entry of other persons into the scheme, the trailer was taken to a warehouse. The agents converged on it and arrested five men. The agents then disassembled the trailer and removed the marijuana.

The defendants argued that the warrantless search of the trailer at the warehouse was unjustified by any exigent circumstances, and that the evidence should have been suppressed. But the Ninth Circuit stated that there was in fact no "search" at the warehouse. The agents merely seized contraband that they knew was there as a result of the search in Ocotillo, which search was a consensual search. Further, the agents were not required to obtain a warrant at the warehouse. Where an earlier search during which contraband was discovered is valid, the seizure of that contraband after the search is valid. "[I]t would have been a 'meaningless gesture' for the police to obtain the warrant." *Id.* at 707. Accordingly, the Court finds the seizure of the marijuana from the trunk of defendant Graviss' car valid. The motion to suppress the evidence must be denied.

In conclusion, the Court notes the words of Judge Bailey Brown of the Sixth Circuit when he was sitting on the District Court for the Western District of Tennessee. In *United States* v. *Sutton*, 341 F.Supp. 320 (W.D. Tenn. 1972), an undercover agent made several arrests during a drug transaction. On the basis of having been told earlier in the transaction that marijuana was in the trunk of a certain car, the agent, after the arrests, procured the keys, opened the trunk, and seized the marijuana. In response to the argument that a warrant was required Judge Brown declared:

> In connection with this contention we have considered, in particular, the following cases: *Carroll* v. *United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543; *Preston* v. *United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777; *Cooper* v. *California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730; *Chambers* v. *Maroney* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, and *Cash* v. *Williams, Sheriff*, 455 F.2d 1227 (6th Cir. 1972). While it is clear that these decisions control this case, we believe that it would be fruitless for this court to attempt by analysis and exposition to unwind them and thereby arrive at the 'true rule.' To do so, we think, would require the mind of a medieval scholastic, which we do not have. Rather, we believe, the most we can do is simply list the factors upon which we base our conclusion that a warrant was unnecessary and leave it for higher judicial authority to say whether we are right or wrong.

Id. at 322.

Here, the factors leading to a conclusion that a warrant was unnecessary are:

(1) This was a seizure following a valid search;

(2) The object from which the marijuana was seized was an automobile;

(3) The seizure was made promptly after the defendants were arrested;

(4) The seizure was made at the scene of the arrest;

(5) The detectives knew that the marijuana was in the trunk of the automobile, and marijuana is contraband;

(6) The seizure concluded a continuing criminal transaction.

An order will be entered this day.

This the 19th day of June, 1981.

/s/ Scott Reed
SCOTT REED, JUDGE
UNITED STATES DISTRICT COURT

* * * * * * *

FILED
JUN 22 1981

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LEXINGTON

CRIMINAL NO. 81-12

UNITED STATES OF AMERICA PLAINTIFF

VS. O R D E R

MARCUS IRVINE GRAVISS
JAMES BRIAN MCGEE DEFENDANTS

* *

Upon consideration of the arguments and the briefs of counsel and the Court being sufficiently advised;

IT IS HEREBY ORDERED:

(1) That the motion of defendants Marcus Irvine Graviss and James Brian McGee to rule the tape recordings inadmissable be, and it hereby is, DENIED;

(2) That the motion of defendants Marcus Irvine Graviss and James Brian McGee to suppress any and all evidence secured as a result of the warrantless search of defendant Graviss' automobile be, and it hereby is, DENIED.

This the 19th day of June, 1981.

/s/ Scott Reed
SCOTT REED, JUDGE
UNITED STATES DISTRICT COURT

A True Copy Attest

Davis T. McGarvey, Clerk
U. S. District Court
By /s/ Ruby V. Hill D.C.

* * * * * * * *

[14]

This written instrument signed by James Brian McGee was acknowledged the 30th day of July, before Elizabeth Roderick, Notary Public.

Are you thoroughly familiar with that, Mr. McGee?

THE DEFENDANT McGEE: Yes, sir, Your Honor.

THE COURT: That's what you want to do?

THE DEFENDANT McGEE: Yes, sir.

THE COURT: All right. Let the written waiver be filed as a part of the record.

The Court will now announce its Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LEXINGTON

CRIMINAL NO. 81-12

UNITED STATES OF AMERICA PLAINTIFF

VS.

MARCUS IRVINE GRAVISS
JAMES BRIAN MCGEE DEFENDANTS

**MEMORANDUM OPINION
INCLUDING FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

Marcus Irvine Graviss, Richard Haskell [15] Gibson and James Brian McGee were jointly indicted by the grand jury in an indictment which contained two (2) counts. Count 1 charged the defendants jointly with conspiring together with each other and with other persons to knowingly and intentionally distribute and dispense a controlled substance, marijuana, a Schedule I controlled substance, which conspiracy constituted a violation of Title 21, United States Code, Section 841(a)(1). At arraignment each of the three defendants entered a plea of not guilty. The case was duly set for trial and in the interim, between arraignment and trial, the defendant Gibson died and the indictment as to him was dismissed.

Defendants Graviss and McGee filed motions to suppress tape recorded conversation which the Court considered and denied in a written opinion entered prior to trial. These defendants also filed a motion to suppress the evidence obtained from a seizure of approximately three hundred pounds of marijuana from the trunk of Graviss' automobile. A suppression hearing was held and the Court denied the motion to suppress in a written memorandum opinion making findings and giving reasons for the disposition made of the motion. Defendants Graviss [16] and McGee then moved for a trial by the Court without a jury on the issue of guilt or innocence of the charges alleged in the incident. The government consented to the defendants' motion and a trial before the Court was held.

The Court now undertakes to make its findings of fact and announce its conclusions of law on the issue of guilt or innocence.

The evidence against the defendants is overwhelming in the opinion of the Court and their guilt was clearly and conclusively proved. The Court has no difficulty whatever in concluding that the defendants Graviss and McGee are guilty of the charges alleged in the indictment beyond a reasonable doubt.

The Court finds from the evidence that an informant for the Oklahome state plice, Larry Jones, contacted defendant McGee with whom he had had past associations. Jones and McGee entered into an agreement whereby Jones would cause the purchase of and McGee would cause the sale of a large quantity of marijuana. The Oklahoma state police contacted the Kentucky state police who agreed to cooperate in apprehending McGee. The Oklahoma and Kentucky narcotics officers pretended to be purchasers of large quantities of marijuana. The government [17] introduced tapes of telephone conversations between Jones and McGee arranging the details of the transaction. After several tentative plans were discussed, it was finally settled that the contraband would be purchased in Fayette County, Kentucky, which it is stipulated is in the Eastern Judicial District of Kentucky, a fact concerning which the Court would take judicial knowledge in any event, and the Oklahoma

people would then transport the contraband from Kentucky to Oklahoma.

Headquarters for the visiting Oklahoma purchasers was the Hilton Inn. The undercover police agents rented two rooms at the Hilton Inn and placed electronic surveillance devices in them by the means of which telephone conversations between the conspirators were recorded. The rooms were also "bugged".

Graviss had no open and direct contact with the transaction until the undercover agents came to Lexington and started operating their headquarters for the agreed purchase and sale of this large quantity of contraband. At this point, however, Graviss very actively entered the picture and he and McGee had numerous conversations with the undercover agents in planning and executing the [18] conspiracy, the result of which was the sale. It would be pointless to detail the various conversations which were recorded. The Court has listened to all of them and has considered the testimony of the undercover agents and the informant Jones. The Court as a matter of credibility is convinced that this evidence is truthful and finds that on the basis of this evidence and on the basis of the statements and actions of the defendants that the conspiracy described in the indictment was willfully formed and existed during the time frame set out in the indictment. The Court also finds that Graviss and McGee each willfully became a member of

the conspiracy. The evidence shows beyond a reasonable doubt that the participation of each was voluntary and intentional, and the evidence further shows beyond a reasonable doubt that each of them had a specific intent to violate the law by trafficking in, possessing, and distributing a large quantity of marijuana in return for a considerable amount of money. The quantity of marijuana involved was approximately three hundred pounds and the price to be paid was either $315 or $310 per pound. The officers brought a large quantity of currency with them which they showed to McGee.

[19]

The Court concludes that the government's evidence established beyond a reasonable doubt all elements of the conspiracy in Count 1 of the indictment.

As to Count 2 the situation is somewhat different, but only in a manner that is of no practical consequence to the legal posture of the defendant McGee.

The evidence establishes beyond a reasonable doubt that after haggling at the motel the sale details were finally agreed upon between Graviss and the undercover agents. At Graviss' invitation, and surely with his acquiescence, he and undercover agents went out to his car which he had previously reported to them contained three hundred pounds of marijuana in its trunk. The other agents stayed at the headquarters

room in the motel. The purpose of the trip with Graviss was to assure the purchasers that the marijuana was available and after the inspection the parties were to return to the motel and the money was to change hands. As Graviss with his purchasers was leaving the motel, McGee and apparently Gibson drove up. They waited at the motel while the inspection exercise was effected. This was accomplished by driving to a lonely spot [20] on the Iron Works Pike in Lexington, Fayette County, Kentucky. There Graviss displayed to the officers the marijuana in the trunk of his automobile. One of the agents took a knife and cut a slit in one of the bags, pulled out a small quantity of marijuana and looked at it. All parties were apparently satisfied that each was performing his part of the bargain. They then returned to the motel. When all the participants were in the headquarters motel room, the purchasers announced that they were law officers and the three defendants were arrested. Thus ended the conspiracy which had been active at least from the preceding February to that moment on March 8, 1981.

As to Count 2 we need not pause long in considering Graviss. It is overwhelmingly demonstrated by the evidence beyond a reasonable doubt that Graviss possessed three hundred pounds of marijuana in the trunk of his automobile and was surely undertaking to exercise dominion and control of it. It is further demonstrated beyond a reasonable doubt by the evidence that Graviss possessed that marijuana with

intent to distribute it. The quantity involved as has been stated was three hundred pounds and the price he was to be paid for [21] it was $310 or $315 a pound. The Court has no difficulty whatever with concluding beyond a reasonable doubt that Graviss had the required specific intent to distribute this contraband. The Court also finds from the evidence beyond a reasonable doubt that Graviss acted knowingly and intentionally. The record is replete with his statements made to the undercover agents concerning the details of the transaction, requests for delay so the purchase deal could be effected, and an offer to adjust the price. Graviss acted knowingly by acting voluntarily and intentionally and not as the result of mistake, accident or other innocent reason. The Court therefore concludes that the defendant Graviss is guilty beyond a reasonable doubt of the offense charged in Count 2 of the indictment.

The Court concludes that the rule of *Pinkerton* v. *United States*, 328 U.S. 640 (1946) supports the conviction of McGee as to Count 2. McGee was present, participating in the sale transaction, was a very active member of the conspiracy from its inception and the conspiracy was a continuing one. The purpose of the conspiracy was to illegally distribute the marijuana for gain. In [22] *Pinkerton* the Supreme Court of the United States declared that a party to a continuing conspiracy may be held responsible for a substantive offense committed by a co-conspirator in furtherance

of the conspiracy even though he does not participate in the substantive offenses or have any knowledge of them. The Sixth Circuit applied the *Pinkerton* rule in *United States* v. *Woods*, 544 F.2d 242 (6th Cir. 1976), *cert. denied*, 429 U.S. 1062, 430 U.S. 969, 431 U.S. 954 (1977). The Fifth Circuit has developed a line of cases applying *Pinkerton* to the substantive offense of possession of a controlled substance. See for example, *United States* v. *Rosado-Fernandez*, 614 F.2d 50 (5th Cir. 1980); *United States* v. *Hodges*, 606 F.2d 520 (5th Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980). The Ninth Circuit, without mentioning *Pinkerton*, has applied the same rule in a "possession" case. See, *United States* v. *Guerrera*, 554 F.2d 987 (9th Cir. 1977). The Second Circuit has applied the rule by implication in holding that there was a sufficiency of evidence to convict a defendant of the substantive offense of possession of a controlled substance where his co-conspirator had possession of the substance. See, *United States* v. *Barrera*, 486 F.2d 333 (2d Cir. 1973), *cert. denied*, [23] 416 U.S. 940 (1974).

It is interesting to note as pointed out in Judge Edwards' opinion for the Sixth Circuit in *United States* v. *Burts*, 536 F.2d 1140 (6th Cir. 1976), that contrary to the general conspiracy statute, 18 U.S.C., Section 371 (1970), the statute at issue here, 21 U.S.C., Section 846 (1970) has been held not to require proof of any overt acts by the three circuits which had considered its validity in face of challenge to the time

of the *Burts* opinion. Considering the extent of McGee's guilt of the conspiracy statute here concerned, and the extent of his participation in the closing of the transaction, taking into account also the teaching of *Pinkerton*, the Court concludes that the defendant McGee is guilty beyond a reasonable doubt of the offense charged in Count 2 of the indictment.

The foregoing shall constitute the findings of fact and conclusions of law of the Court. A separate judgment shall be entered adjudging the defendants guilty as charged under each count of indictment number 81-12.

Gentlemen for the defense, are there any requests you wish to make at this [24] time?

MR. REAVES: Your Honor, I assume the Court is going to set the sentencing off at some future time?

THE COURT: Yes, sir.

MR. REAVES: I just ask that they be allowed to remain on the same bond until that date.

I don't believe the United States has any objection.

MR. FAMULARO: That is true, Your Honor. The United States does not object at this time to the defendants being allowed to remain on the same bond, providing the Court tells them when and where to be back for sentencing.

THE COURT: All right. What is the present bond, $2500 as to each defendant?

MR. FAMULARO: That's correct, Your Honor. I believe that is full cash bond as to each defendant.

MR. REAVES: That's correct, Your Honor.

THE COURT: All right. I will set this case for sentencing on Wednesday, September the 2nd, 1981, at 9:30 a.m.

I will direct that the [25] probation office prepare and make available to me a pre-sentence investigation report. I will further direct that that pre-sentence investigation report shall be made available to the defendants and their attorneys prior to the date set for sentencing and it shall also be made available to the United States if the United States Attorney's office so requests.

The defendants shall be continued on their present bond to guarantee their appearance in this court for sentencing on September the 2nd, 1981, at 9:30 a.m., at Lexington, or at such earlier time and place as the Court may by order direct.

Remember that it would be a very serious thing not to report at the time designated. The bonds would be forfeited and the defendants would be subject to prosecution for bail jumping, which involves additional penalty of imprisonment and fine in a rather severe range.

Everybody understand that?

THE DEFENDANT McGEE: (Nodding affirmatively)

THE COURT: All right. Do you have any other requests at this time, Mr. Reaves or [26] Mr. Isaacs?

MR. REAVES: No, Your Honor.

THE COURT: Does the United States have any requests?

MR. FAMULARO: The United States has no requests, Your Honor.

THE COURT: All right. Let the judgment be entered.

Mr. Marshal, you may adjourn court, court in course.

* * * * * * * * * * * * * * * *

[27]

I, Ella G. McGarvey, Official Reporter, United States District Court, Eastern and Western Districts of Kentucky, do certify that the foregoing constitutes a true, full and accurate transcript of the proceedings of a hearing at which the Court's Memorandum Opinion, Including Findings of Fact and Conclusions of Law, was handed down, in Criminal No. 81-12, United States of America v. Marcus Irvine Graviss and James Brian McGee, in the United States District Court for the Eastern District of Kentucky, at

Lexington, on July 31, 1981, before His Honor, Scott Reed, Judge of said Court.

IN TESTIMONY WHEREOF, Witness my official hand as reporter aforesaid, this the 27th day of October 1981.

Official Reporter

* * * * * * *

Eastern District of Kentucky
FILED
JUL 31 1981
AT LEXINGTON
DAVIS T. McGARVEY
CLERK, U.S. DISTRICT
COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CRIMINAL NO. 81-12

UNITED STATES OF AMERICA PLAINTIFF

VS

MARCUS IRVINE GRAVISS
JAMES BRIAN McGEE DEFENDANTS

— JUDGMENT —

In conformity with Findings of Fact and Conclusions of Law entered herein by the Court on this date,

IT IS THEREFORE ADJUDGED, that the defendant, Marcus Irvine Graviss, is guilty as charged in Counts 1 and 2 of the Indictment; and that the defendant, James Brian McGee, is guilty as charged in Counts 1 and 2 of the Indictment.

This the 31st day of July, 1981.

/s/ Scott Reed
Scott Reed, Judge

NOTICE IS HEREBY GIVEN OF THE ENTRY OF THIS ORDER OR JUDGMENT ON 7-31-81
DAVIS T. MC GARVEY, CLERK
BY: /s/ Ruby V. Hill D.C.

A True Copy Attest

Davis T. McGarvey, Clerk
U. S. District Court
By /s/ Ruby V. Hill D. C.

* * * * * * * *

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MARCUS IRVINE GRAVISS AND
JAMES BRIAN MCGEE PETITIONERS

AND

UNITED STATES OF AMERICA RESPONDENT

CONSTITUTIONAL PROVISION INVOLVED

FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.